

NTSB Order No. EA-4297

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of November, 1994

Docket SE-13300

competency. As further discussed below, respondent's appeal is granted and the initial decision is reversed.²

On April 4, 1992, respondent acted as pilot in command of a Cessna 172 on a passenger-carrying cross-country flight originating in Lake Havasu, Arizona, during which he encountered clouds,³ became disoriented, landed twice without knowing at which airports he was landing, and ultimately crashed in mountainous terrain near Claremont, California. In a letter dated April 27, 1992, the FAA notified respondent that the circumstances of the April 4 flight and accident "give reason to believe that your competence as a Private Pilot may be in question," and asked him to undergo a re-examination of his competence. (Exhibit C-5.) This re-examination request was made pursuant to section 609 of the Federal Aviation Act of 1958, as amended, which authorizes the Administrator to "reexamine any civil airman." 49 App. U.S.C. 1429 [now recodified at 49 U.S.C. 44709].

In a separate action resulting from this incident,

² The Administrator has moved to dismiss respondent's "Supplemental Appeal Brief" (providing transcript citations to support points made in respondent's timely filed appeal brief) as untimely filed. Since the supplemental brief was filed after the time for filing respondent's appeal brief had expired and there was no timely request for an extension of time, we will grant the motion to dismiss. See Administrator v. Hooper, 6 NTSB 559 (1988). We note, however, that the dismissal of this brief did not prejudice respondent, since we have independently reviewed the transcript and are aware of the supporting citations respondent sought to put before us.

³ Respondent is not IFR-rated. He had received his private pilot certificate only four months earlier.

respondent accepted a 180-day suspension of his pilot certificate based on violations of 14 C.F.R. 61.3(e)(1), 91.55(a), and 91.173. (See Exhibit C-1, Order of Suspension dated August 10, 1992.)

With regard to the re-examination request, respondent has consistently expressed a willingness to undergo the requested re-examination and, at the hearing in this case, he effectively conceded the reasonableness of the Administrator's request. In any event, the evidence in the record clearly establishes that the circumstances of respondent's April 4, 1992 flight raised legitimate questions as to his flight planning and piloting competence.⁴ He has not yet undergone the test, however, because he is still recovering from injuries sustained in the crash and, according to his orthopedic surgeon, is physically unable to resume flying. Furthermore, respondent states that his medical certificate has lapsed and, due to his injuries, he does not believe he will be able to obtain medical recertification for some time. (A valid medical certificate is a pre-requisite to undergoing the requested re-examination, since respondent will be required to act as pilot in command during the re-examination flight.) Respondent claims that, under these circumstances, it

⁴ The record indicates that respondent used poor judgment in, among other things, not obtaining sufficient weather information about his route of flight, landing at a military base without proper authority, failing to be aware of his fuel consumption and to properly address a perceived low-fuel situation, and in pressing on towards his destination airport through what ATC advised him were instrument meteorological conditions.

is both unfair and unnecessary for the Administrator to suspend his certificate as "punishment" for failing to take the test.

The law judge upheld the suspension order, noting that "the Administrator has a duty and an obligation to promote aviation safety" and that "[i]rrespective of [r]espondent's unfortunate physical incapacitation, . . . the Administrator, in order to insure that [r]espondent does not fly again until passing re-examination, had the right to issue the [o]rder suspending his [c]ertificate pending successful accomplishment of re-examination." (Tr. 139.) We disagree.

This appears to be a case of first impression, as we are unaware of any prior case where the airman has conceded the reasonableness of the request but claims that, because he is unable (as distinguished from unwilling) to comply, the resulting suspension is unreasonable. Although we have stated in prior cases that, in order to prevail on an order suspending an airman's certificate pending successful re-examination the Administrator need only show, as he did in this case, that a reasonable basis exists for questioning the airman's competence,⁵ that standard presupposes the existence of a factor which is not present in this case: the airman's refusal (either actual or constructive) to undergo the re-examination. We do not believe that a suspension is justified where, as in this case, the airman has willingly agreed to undergo the re-examination, but is

⁵ See, e.g., Administrator v. Reinhold, NTSB Order No. EA-3973 (1993); Administrator v. Norris, NTSB Order No. EA-3687 at 4 (1992).

physically unable to do so.

The FAA's reasoning in this case appears to be based on the possibility that, if allowed to retain his pilot certificate, respondent might, when his health permits, resume flying under authority of his still-valid certificate before submitting to re-examination. However, such a concern inheres in every re-examination case, including those in which there is prompt compliance with a request for retesting, since a pilot who has been asked to undergo a re-examination does not forfeit the right to exercise the privileges of his certificate before he actually completes any required testing.

We do not question the Administrator's authority to suspend, either through an emergency action or otherwise, an airman certificate pending successful re-examination where the basis for the suspension is reasonable doubt over the airman's competence or qualifications. However, the suspension in this case is not so predicated. It is, rather, based on respondent's alleged refusal to do something the Administrator appears to concede he could not accomplish when asked. In these circumstances we are compelled to hold that respondent's willingness to submit to re-examination when medically able precludes a suspension based on an alleged refusal to take the test.⁶

⁶ Contrary to the Administrator's suggestions, we do not consider it unduly burdensome for the FAA to maintain contact with respondent and to postpone the scheduling of the re-examination until such time as respondent is physically able to participate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted; and
2. The initial decision and the order of suspension are reversed.

HALL, Chairman, LAUBER and HAMMERSCMIDT, Members of the Board, concurred in the above opinion and order.